

OA 9-5-90

SUPREME COURT OF FLORIDA

Case No. 75,164

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BANCO DE COSTA RICA,

Petitioner,

v.

NORBERTO RODRIGUEZ,

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Discretionary Review From the
Third District Court of Appeal

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PRELIMINARY STATEMENT

This is Petitioner's Initial Brief on the Merits filed pursuant to the Order Accepting Jurisdiction and Setting Oral Argument dated April 9, 1990.

Petitioner, Banco de Costa Rica, Defendant in the trial court, will be referred to as "Banco" or "Defendant."

Respondent, Norberto Rodriguez, Plaintiff in the trial court, will be referred to as "Plaintiff."

The Appendix will be cited as "A-____" with page designation where appropriate.

The Opinion of the Third District Court of Appeal, a conformed copy of which is contained in the Appendix, shall be referred to as the "Decision."

STATEMENT OF THE CASE AND OF THE FACTS

On May 5, 1987, Plaintiff filed a Complaint against Banco seeking to recover damages based on four (4) dishonored checks ("Checks"), all dated May 5, 1982. A-1. The Checks purport to be drawn by Banco on its correspondent bank account held by Citizens and Southern International Bank of Miami ("C&S").

On or about July 11, 1988, before effecting initial service on Banco, Plaintiff scheduled the deposition of C&S. Plaintiff mailed a copy of the Re-Notice of Deposition, A-2, directly to Banco in San Jose, Costa Rica. In response thereto, on August 15, 1988, Banco served its Motion to Quash Notice and Re-Notice of Deposition/Motion to Quash Subpoena Duces Tecum and to Prevent Taking of the Deposition of Citizens and Southern International Bank of Miami ("Motion to Quash"), seeking to quash service of the original Notice of Deposition, the Re-Notice of Deposition, the Subpoena Duces Tecum, and to prevent the taking of the deposition of C&S until after Banco is served with process. A-3. Banco's Motion to Quash was based upon the fact that Plaintiff had not yet caused service of process of the Summons and Complaint, and, therefore, the service of a notice of deposition and the taking of the deposition prior to service of process would violate Florida Rules of Civil Procedure and case law.

On August 25, 1988, the trial court entered its Order on Defendant's Motion to Quash Notice and Re-Notice of Deposition/Motion to Quash Subpoena Duces Tecum and to Prevent Taking of

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the Deposition of Citizens and Southern International Bank of Miami which denied Banco's Motion to Quash. A-4.

On August 26, 1988, Banco filed and served its Motion to Dismiss Complaint for Lack of Personal Jurisdiction and for Failure to State a Cause of Action ("Motion to Dismiss") seeking, inter alia, to dismiss the Complaint for lack of personal jurisdiction. A-5. The Motion to Dismiss, as supported by the Affidavit, A-6, was based upon the fact that Banco does no business in the State of Florida and has no connection with the State of Florida other than the maintenance of correspondent bank accounts.

Plaintiff served its Motion to Strike Defendant's Motion to Dismiss Complaint for Lack of Personal Jurisdiction contending that Banco generally appeared by filing the Motion to Quash. A-7. Banco served its Memorandum of Law in Opposition to Motion to Strike Defendant's Motion to Dismiss Complaint for Lack of Personal Jurisdiction. A-8. The trial court entered its Order on Defendant's Motion to Dismiss Complaint for Lack of Personal Jurisdiction ("Order Denying Motion to Dismiss") which denied Banco's Motion to Dismiss on the basis that Banco generally appeared by filing the Motion to Quash. A-9.

The District Court of Appeal, Third District, affirmed the trial court's Order Denying Motion to Dismiss, holding that Banco sought affirmative relief and generally appeared because the Motion to Quash was a request made "to use the power and authority of a court to prevent the plaintiff from exercising a right accorded by [Fla.R.Civ.P. 1.310(a)]." In reaching its

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Decision, the District Court held that Fla.R.Civ.P. 1.310(a) "permit[s] the taking of any deposition by party plaintiff immediately upon filing suit, except that of the defendant within the first thirty days after service of process." A-10.

Banco timely petitioned to invoke the discretionary jurisdiction of this Court to review the Decision of the District Court. This Court accepted jurisdiction in its order dated April 9, 1990.

SUMMARY OF ARGUMENT

Banco, by filing the Motion to Quash, properly contested personal jurisdiction in its first paper filed. Accordingly, the Motion to Quash did not waive the defense of lack of personal jurisdiction, but in fact preserved the issue. The Motion to Quash does not go to the merits of the Complaint, or in any way confirm, deny or state a defense to the Complaint, and therefore cannot constitute a waiver of personal jurisdiction. Even if the Motion to Quash had been granted, the relief would have been tantamount to an extension of time, which is insufficient relief to effect a waiver of personal jurisdiction.

The allegations of the Complaint are insufficient to confer long-arm jurisdiction over Banco. Banco is not conducting business within the State of Florida, and did not breach any contract in this State. Maintaining a correspondent bank account, even if that correspondent bank account is involved in the case, does not constitute sufficient minimum contacts for long-arm jurisdiction. Banco did not breach any contract in Florida because under the facts alleged by Plaintiff and the Uniform Commercial Code, any breach would have occurred in Costa Rica. Further, the mere failure to pay money in Florida, standing alone, is insufficient to obtain jurisdiction over a nonresident.

ARGUMENT

I. BANCO DID NOT VOLUNTARILY SUBMIT TO THE JURISDICTION OF THE COURT BY FILING THE MOTION TO QUASH.

Banco's Motion to Quash did not waive personal jurisdiction because the procedurally proper motion was expressly based on the lack of service on Banco, and the Plaintiff's resulting violations of the Florida Rules of Civil Procedure. Prior to service of process of the Summons and Complaint, Plaintiff purported to serve Banco with notice of a deposition of a non-party by mailing a copy of the Re-Notice of Deposition to Banco in Costa Rica. In response, Banco filed and served the Motion to Quash, which sought to quash service of the Re-Notice of Deposition, based upon Plaintiff's failure to first cause service of process of the Summons and Complaint upon Banco. Papers may not be served by mail on a party until after service of original process. Fla.R.Civ.P. 1.080; See, Drake v. Scharlau, 353 So.2d 961 (Fla. 2d DCA 1978). Therefore, Plaintiff violated Fla.R.Civ.P. 1.310(b)(1) by not properly serving Banco with the notice of the deposition. Moreover, the deposition itself was improperly scheduled. Rule 1.310(a) prohibits the taking of depositions until 30 days after service of initial process and pleading upon any defendant. No depositions may be taken prior to service of a defendant. The rule is not limited to depositions of defendants, as held by the District Court, but includes depositions of any witness. Plaintiff was not entitled to take the deposition scheduled in

the Re-Notice of Deposition, because Banco had not yet been served with the Summons and Complaint, and Plaintiff had not obtained leave of court. Fla.R.Civ.P. 1.310(a).

The Motion to Quash was based on Plaintiff's failure to effect service of process essential to personal jurisdiction. Therefore, Banco contested jurisdiction in its first paper filed. As noted by Judge Baskin in her dissent, "the motion addresses the issue of jurisdiction by stating repeatedly that service of the complaint and summons had not been effected." A-10, p.4. The Motion to Quash was procedurally proper. "A party's amenability to the jurisdiction of the court may be reached by a motion to quash for insufficiency of process or insufficiency of service of process." Palmer Johnson Yachts v. Ray Richard, Inc., 347 So.2d 779, 780 (Fla. 3d DCA 1977); see also, Lendsay v. Cotton, 123 So.2d 745 (Fla. 3d DCA 1960). Cf. Elmex Corp. v. Atlantic Federal Savings and Loan Association of Ft. Lauderdale, 325 So.2d 58, 61 (Fla. 4th DCA 1976). (Motion to dismiss where the relief sought was in the nature of abatement on the ground of lack of jurisdiction over the person treated as a motion to dismiss for lack of jurisdiction.) In Baraban v. Sussman, 439 So.2d 1046 (Fla. 4th DCA 1983), the court held that a motion to quash "is appropriate to question the trial court's jurisdiction based on insufficiency of service of process." Id. at 1047. Thus, Banco contested jurisdiction over the person in its first paper filed, and the issue was not waived. Fla.R.Civ.P. 1.140,

Banco did not make a general appearance sufficient to waive personal jurisdiction because the Motion to Quash did not accept or invoke the court's jurisdiction by requesting relief on the merits of the case. The Decision under review ignores the fact that the Motion to Quash did not address the merits of the case. In Ortell v. Ortell, 91 Fla. 50, 107 So. 442 (1926), this Court held:

A general appearance is entered in a cause by the making of any motion which involves the merits.

107 So. at 445. The Motion to Quash involved only the Plaintiff's violation of the Florida Rules of Civil Procedure, and did not involve the merits of the case, and, therefore, Banco did not generally appear by filing it. The courts will look to the substance of a motion to determine whether it accepts or invokes the jurisdiction of the court and thus effects a waiver of personal jurisdiction.

In Public Gas Co. v. Weatherhead Co., 409 So.2d 1026 (Fla. 1982), this Court approved the decision and rationale of Weatherhead Co. v. Coletti, 392 So.2d 1342 (Fla. 3d DCA 1980). In Coletti, the Third District adopted the views of Judge Robert P. Smith, Jr. expressed in his specially concurring opinion in Marine Distributors of Virginia v. Kelly, 374 So.2d 592 (Fla. 5th DCA 1979), appeal dismissed, 383 So.2d 1198 (Fla. 1980), overruled by, Public Gas Co. v. Weatherhead Co., 409 So.2d 1026 (Fla. 1982). Judge Smith had reluctantly concurred in the Kelly decision due to recent binding District Court decisions, but he recommended a contrary result by the adoption

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... of a waiver rule applying only when the defendant, without reserving his jurisdictional objection, takes some action the effect of which is to request relief on the merits. See, McKelvey v. McKelvey, 323 So.2d 651 (Fla. 3d DCA 1976); First Wisconsin Nat'l Bank of Milwaukee v. Donian, 343 So.2d 943 (Fla. 2d DCA 1977), cert. denied, 355 So.2d 513 (Fla. 1978).

Coletti, 392 So.2d at 1344, n.5. (quoting from Judge Smith's specially concurring Opinion in Kelly, 374 So.2d at 593). The Coletti court, not being bound by similar decisions, adopted the views of Judge Smith and held:

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[a] general appearance ordinarily will be effected by making a motion involving the merits of plaintiff's claim and his right to maintain the suit and secure the relief sought.

392 So.2d at 1343-44 (emphasis supplied by the court). This Court approved the rationale of Coletti in Public Gas Co., 409 So.2d at 1027. This established the rule that a waiver of personal jurisdiction can only be effected by the filing of a motion requesting relief on the merits of the case.

The Motion to Quash could not effect a waiver of personal jurisdiction because it did not go to the merits of the case. The motion did not confirm, deny, or state a defense to any portion of the Complaint. No relief was requested which was in any way related to the merits. Even if the Motion to Quash had been granted, its only effect would have been to postpone the deposition of C&S until 30 days after service of process upon Banco. No consideration of the merits of Plaintiff's claim would be involved. The Motion to Quash is analogous to the motion for enlargement of time in Barrios v. Sunshine State

Bank, 456 So.2d 590 (Fla. 3d DCA 1984), wherein the court held that a motion for enlargement of time did not constitute a general appearance and waiver of the subsequently asserted defense of lack of personal jurisdiction, because the motion "did not go to the merits of the case." 456 So.2d at 591. See also, Paulson v. Faas, 171 So.2d 9 (Fla. 3d DCA 1965) (a stipulation for extension of time to answer a complaint does not preclude the defendant from subsequently raising the defense of lack of personal jurisdiction).

In Moo Young v. Air Canada, 445 So.2d 1102 (Fla. 4th DCA), petition for review dismissed, 450 So.2d 489 (Fla. 1984), the court, citing to this Court's Public Gas Co. decision, held that a motion for more definite statement "did not go to the merits of the case and therefore did not constitute a general appearance waiving absence of jurisdiction." 445 So.2d at 1104. The Motion to Quash in this case is less related to the merits than the motion for more definite statement in Moo Young. The Motion to Quash does not even imply that Banco had even seen a copy of the Plaintiff's Complaint.

The sole relief sought in the Motion to Quash was the enforcement of the Rule prohibiting the deposition of C&S until after Plaintiff effected service of process of the Summons and Complaint. The Motion to Quash does not attack the Complaint, raise any defense to the Complaint, or deny any part of the Complaint. Accordingly, Banco did not waive personal jurisdiction by filing a motion directed to the merits of the

case, and the issue was preserved for the Motion to Dismiss, the second paper filed by Banco.

The Plaintiff suggested below that the Motion to Quash was a request for affirmative relief sufficient to cause a waiver of personal jurisdiction. In fact, the Motion to Quash sought no relief other than the prevention of a violation of the Rules of Civil Procedure. By procuring and serving a subpoena for an improper deposition, the Plaintiff attempted to put Banco in the position of choosing between waiving jurisdiction or suffering the discovery of sensitive information. This gamesmanship is to no avail because the Motion to Quash did not seek affirmative relief.

A request for affirmative relief waiving the defense of lack of personal jurisdiction is illustrated by First Wisconsin National Bank of Milwaukee v. Donian, 343 So.2d 943 (Fla. 2d DCA 1977), cert. denied, 355 So.2d 513 (Fla. 1978), in which the court analyzed whether the defendants "obtained some relief or material benefit sufficient to constitute a submission by them to the court's jurisdiction." 343 So.2d at 945. The Donian court held that the defendants obtained affirmative relief on the merits by virtue of the lower court's approval of an agreement for stay of proceedings, which included certain adjustments to the defendants' loan with the plaintiff bank, and which provided for a respite of six to nine months during which the defendants could seek to refinance. 343 So.2d at 945.

No relief or material benefit remotely similar to that obtained in Donian was sought by Banco in the Motion to Quash,

and, therefore, Banco did not seek "affirmative relief" thereby waiving its objection to personal jurisdiction.. As illustrated by Donian, the test is whether the defendant requests affirmative relief on the merits. See also, Green v. Roth, 192 So.2d 537, 540 (Fla. 2d DCA 1966). Banco's Motion to Quash did not seek relief on the merits of the case, and, therefore, it cannot be deemed a request for affirmative relief. Cf., Visioneering Concrete Construction Co. v. Rogers, 120 So.2d 644, 646 (Fla. 2d DCA 1960) (a counterclaim is a request for affirmative relief on the merits which waives the defense of lack of jurisdiction).

The rule established by these cases is codified in Fla.R.Civ.P. 1.140(h)(1). Banco's Motion to Quash did not constitute a waiver of defenses under this rule. The Motion to Quash was not made pursuant to Fla.R.Civ.P. 1.140(b), (e) or (f), and no responsive pleading was filed prior to the Motion to Dismiss. Accordingly, Banco did not waive the defense of lack of personal jurisdiction under Florida Rules of Civil Procedure.

Banco did not voluntarily submit itself to the jurisdiction of the court or waive personal jurisdiction by filing the Motion to Quash. Therefore, the issue of personal jurisdiction was preserved for the Motion to Dismiss. The trial court erred in failing to reach the merits of Banco's Motion to Dismiss.

II. BANCO DOES NOT HAVE THE REQUISITE MINIMUM CONTACTS WITH THE STATE OF FLORIDA FOR THE COURT TO ACQUIRE PERSONAL JURISDICTION.

Banco's only contact with the State of Florida is the maintenance of correspondent bank accounts. Banco has not conducted and does not conduct any other business in this state, nor does it have any officers, agents, personnel or property in this state. A-6. Plaintiff filed no affidavit and did not otherwise offer any evidence in opposition to Banco's Motion to Dismiss and supporting Affidavit.

Florida's long-arm statute, §48.193, Fla.Stat. (1987), provides in pertinent part:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

The Florida long-arm statute is strictly construed, and parties seeking to invoke long-arm jurisdiction are required to bring themselves clearly within the statute's provisions. Bank of Wessington v. Winters Government Securities Corp., 361 So.2d 757 (Fla. 4th DCA 1978); W.C.T.U.Railway Co. v. Szilagyi, 511 So.2d 727 (Fla. 3d DCA 1987).

The only allegation in support of long-arm jurisdiction in Plaintiff's Complaint, is that Banco maintains a correspondent

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bank account in Florida. In Oriental Imports and Exports, Inc. v. Maduro & Curiel's Bank, N.V., 701 F.2d 889 (11th Cir. 1983), the court, applying Florida law, held that:

the maintenance of a correspondent banking relationship alone is not sufficient to confer personal jurisdiction over a foreign bank.

Id. at 891. The court, concluding that the defendant foreign bank did not have the requisite minimum contacts with the State of Florida to satisfy due process, stated:

{M}ost banks of any size maintain correspondents in all major regions of the country and in selected areas overseas. It would be a distortion of due process to hold that a state acquires general personal jurisdiction over an out-of-state bank (as opposed to in rem jurisdiction) merely because the bank has a correspondent relationship with a bank within the state and a balance on deposit with its correspondent bank. ...

We are persuaded that the Florida long-arm statute [§ 48.193, Fla.Stat.], which confers jurisdiction over a nonresident defendant who "operates, conducts, engages in or carries on a business" in Florida, would not be interpreted to permit personal jurisdiction solely on the basis of a foreign bank's correspondent relationship with a Florida bank.

701 F.2d at 892.

The Oriental Imports and Exports, Inc. court cited to Bank of America v. Whitney Central National Bank, 261 U.S. 171, 43 S.Ct. 311, 67 L.Ed. 594 (1923), in which the United States Supreme Court held that a New York District Court could not assert jurisdiction over a Louisiana bank whose only contact with the State of New York was the maintenance of correspondent bank accounts with six New York banks.

The Oriental Imports and Exports, Inc. court also relied upon April Industries, Inc. v. Levy, 411 So.2d 303 (Fla. 3d DCA 1982), in which the court held that the presence of the defendant corporation's personal property in Florida pursuant to an escrow agreement executed outside of Florida, and the control of that property by a Florida escrowee, were insufficient contacts to find that the corporation conducted business or had an agency in Florida for the purposes of the long-arm statute, §48.193(1)(a), Fla.Stat. (1987). April Industries, Inc., 411 So.2d at 305. The Oriental Imports and Exports, Inc. court reasoned that April Industries, Inc. suggests that the maintenance of correspondent bank accounts alone would not be sufficient for long-arm jurisdiction. 701 F.2d at 892.

Courts in other jurisdictions have also held that the maintenance of a correspondent banking relationship alone is not sufficient to confer personal jurisdiction over a foreign bank. See, Leema Enterprises, Inc. v. Willi, 575 F. Supp. 1533 (S.D. N.Y. 1983); National American Corp. v. Federal Republic of Nigeria, 425 F. Supp. 1365 (S.D. N.Y. 1977); Faravelli v. Bankers Trust Co., 85 A.D.2d 335, 447 N.Y.S.2d 962 (1982), aff'd, 59 N.Y.2d 615, 463 N.Y.S.2d 194, 449 N.E.2d 1272 (1983); Nemetsky v. Banque de Developpement de la Republique du Niger, 64 A.D.2d 694, 65 A.D.2d 748, 407 N.Y.S.2d 556 (1978), aff'd, 48 N.Y.2d 962, 425 N.Y.S.2d 277, 401 N.E.2d 388 (1979); E.I.C., Inc. v. Bank of Virginia, 108 Cal. App. 3d 148, 166 Cal. Rptr. 317 (2d Dist. 1980). Each of these cases involved an assertion

of long-arm jurisdiction against a foreign bank whose only connection with the forum state was the maintenance of correspondent bank accounts. In each case, the court held that the foreign bank does not have minimum contacts with the forum state to confer personal jurisdiction. In National American Corp., the court held that a foreign bank did not have minimum contacts with the forum state even though payment was to be made through the foreign bank's correspondent bank account. 425 F. Supp. at 1370. Following this line of cases, Banco does not have the requisite minimum contacts with Florida to confer personal jurisdiction in this state.

Section 607.304(2)(c), Fla.Stat. (1987), which governs whether a foreign corporation needs to register to do business in this state, provides that maintenance of bank accounts alone does not constitute "transacting business" in this state, and, therefore, the foreign corporation need not file an application to transact business with the Department of State. While §607.304(2)(c), Fla.Stat. (1987), does not directly apply in this case, its definition of "transacting business" is persuasive in analyzing the meaning of "[o]perating, conducting, engaging in, or carrying on a business or business venture in this state" under the long-arm statute §48.193(1)(a), Fla.Stat. (1987), and illustrates that Banco lacks minimum contacts with Florida.

In the district court, Plaintiff argued that long-arm jurisdiction in this case is governed by §48.193(1)(g), Fla.Stat. (1987), and not §48.193(1)(a), Fla.Stat. (1987).

Section 48.193(1)(g), Fla.Stat. (1987), provides for long-arm jurisdiction over any person "[b]reaching a contract in this state by failing to perform acts required by the contract to be performed in this state." Plaintiff argues that Banco breached a contract in this state, because the Checks were dishonored by a Florida bank, C&S, and he asserts that a basis for long-arm jurisdiction is alleged in paragraph 9 of the Complaint, which states: "THE CHECKS were wrongfully dishonored and BANCO refused and continues to refuse to pay said checks." A-1, p.2. This argument is based upon several misconceptions of the Uniform Commercial Code regarding checks.

The alleged Checks, attached as an exhibit to the Complaint, purport to have been drawn by Banco in San Jose, Costa Rica, on its correspondent bank account held by C&S in Miami. In paragraph 5 of the Complaint, Plaintiff alleges:

On or about May 5, 1982, in the City of San Jose, Costa Rica, BANCO, through duly authorized officers executed and delivered to RODRIGUEZ for consideration four bank checks true copies of which are attached hereto and made a part hereof and hereinafter referred to as THE CHECKS, drawn on their account at Citizens and Southern International Bank of Miami.

A-1, p.1. Thus, the only acts of Banco alleged by Plaintiff occurred in Costa Rica and not Florida. The only activity related to the Checks which occurred in Florida was the dishonoring of the Checks by the drawee bank, C&S. The exhibit attached to the Complaint reveals that C&S dishonored the Checks on the basis that they are counterfeit, as indicated by the stamps and writings on the Checks. A-1, pp.3-4.

Plaintiff is apparently asserting a breach of contract claim against Banco as drawer of the Checks pursuant to Chapter 673, Fla.Stat. (1987). No such breach of contract occurred in Florida. Section 673.122(3), Fla.Stat. (1987), provides that "[a] cause of action against the drawer of a draft ... accrues upon demand following dishonor of the instrument." Section 673.413(2), Fla.Stat. (1987), provides that "[t]he drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up." Breach does not occur upon dishonor. A holder must first give notice of dishonor or protest. Breach does not occur until there is a failure to pay upon notice of dishonor. Thus, Banco's alleged breach of contract would not have occurred upon C&S' dishonoring of the Checks, the only activity occurring in Florida, but only on refusal to pay after demand following dishonor.

In Tepper v. Citizens Federal Savings and Loan Assoc., 448 So.2d 1138 (Fla. 3d DCA 1984), the plaintiff brought an action against the defendant-bank seeking payment of a check issued by the defendant-bank as drawer. Similar to the Checks in the instant case, the check in Tepper was drawn by the defendant-bank against its account held by another bank. The court held:

The drawer, on the other hand, is only secondarily liable on the instrument, in that there are conditions precedent to liability. W. Hawkland, Commercial Paper 52 (2d ed. 1979). The normal conditions precedent include presentment to the drawee, dishonor, and notice of dishonor. Id.; see

§ 673.501. Therefore, a cause of action against the drawer of a draft accrues only upon demand following dishonor of the instrument. § 673.122(3). Notice of dishonor constitutes a demand. Id. This latter section is clearly dispositive of the issue presented, as a cause of action against the drawer herein, Citizens Federal, thus did not accrue until appellant's representative received notice of dishonor from the drawee, Jefferson National Bank.

Tepper, 448 So.2d at 1140 (emphasis added). In the instant case, therefore, Plaintiff did not have a cause of action against Banco when C&S dishonored the Checks in Miami. Plaintiff's cause of action, if any, would have accrued upon Banco's receipt of notice of dishonor in Costa Rica following dishonor. Id. Therefore, Banco's failure to pay would be a breach of contract occurring in Costa Rica, and accordingly, §48.193(1)(g), Fla.Stat. (1987), does not apply to confer long-arm jurisdiction over Banco.

In the Answer Brief below, Plaintiff relied upon First National Bank of Kissimmee v. Dunham, 342 So.2d 1021 (Fla. 4th DCA 1977), for the proposition that Banco breached a contract in Florida. In Dunham, the court found jurisdiction in Florida on the basis that a promissory note is payable at the residence of the payee if no place of payment is designated in the instrument. Id. at 1022. Thus, following Plaintiff's logic, the alleged breach of contract in this case would have occurred in Spain, because Spain is alleged to be Plaintiff's place of residence. **A-1**, p.1.

Plaintiff's argument is also incorrect because a check and a note are different instruments under the Uniform Commercial

Code. Section 673.104(2)(b), Fla.Stat. (1987), states that a writing is a check "if it is a draft drawn on a bank and payable upon demand." Section 673.104(2)(a), Fla.Stat. (1987), provides that a writing is a draft "if it is an order." Section 673.102(1)(b), Fla.Stat. (1987), defines "order" as follows:

An "order" is a direction to pay and must be more than an authorization or request. It must identify the person to pay with reasonable certainty. ... (Emphasis added.)

Thus, a check directs the drawee bank to pay, and is not of itself a promise to pay.

In contrast, a note "is a promise other than a certificate of deposit." §673.104(2)(d), Fla.Stat. (1987). Section 673.102(1)(c), Fla.Stat. (1987), defines "promise" as follows:

A "promise" is an undertaking to pay and must be more than an acknowledgment of an obligation.

Therefore, the alleged Checks would have directed C&S to pay, and they would not constitute Banco's promise to pay. §§673.102(1)(b), 673.104(2)(a) and (b), Fla.Stat. (1987). Accordingly, C&S' failure to pay on the Checks would not constitute Banco's breach of a "promise" in Florida.

Plaintiff's mischaracterization of the checks as notes does not support jurisdiction in Florida. The mere failure to pay money in Florida, standing alone, does not establish minimum contacts to confer long-arm jurisdiction. Venetian Salami Co. v. Parthenais, 554 So.2d 499 (Fla. 1989). Similar to the Plaintiff in this case, the plaintiff in Venetian Salami Co. sought to obtain long-arm jurisdiction over the defendant

pursuant to §48.193(1)(g), Fla.Stat. (1987), based upon the defendant's failure to pay money in Florida. This Court held:

we do not believe that the mere failure to pay money in Florida, standing alone, would suffice to obtain jurisdiction over a nonresident defendant.

554 So.2d at 503. Thus, even if it can be alleged that Banco breached a contract in the State of Florida by its failure to pay money, long-arm jurisdiction over Banco is still lacking.

In the case of Chase Manhattan Bank v. Banco del Atlantico, F.A., 343 So.2d 936 (Fla. 3d DCA 1977), the plaintiff sought to invoke long-arm jurisdiction over the defendant in a suit to recover damages resulting from dishonored drafts. The court held that the plaintiff failed to invoke long-arm jurisdiction over the defendant because the complaint did not allege (1) that the cause of action arose from a business or business venture of the defendant in Florida, or (2) that the cause of action arose in Florida. Id. at 937. In the instant case, Plaintiff has not alleged that his cause of action arises out of any business or business venture in Florida. As a matter of law, Plaintiff's cause of action, if any, would have arisen in Costa Rica, the place where Plaintiff alleges the Checks to have been executed and delivered, and where demand following dishonor would have been made. See, Banco de Honduras, S.A. v. Prenner, 211 So.2d 600 (Fla. 4th DCA 1968); H. Bailey, Brady on Bank Checks, ¶30.7 (1987). Therefore, on its face, Plaintiff's Complaint fails on both points raised in Chase Manhattan; in

one instance, the allegations are insufficient, while in the other they are fatal.

In the procedural posture presented to this Court, dismissal is proper. In W.C.T.U. Railway Co. v. Szilagy, 511 So.2d 727 (Fla. 3d DCA 1987), the court set forth the burden of proof on personal jurisdiction challenges as follows:

A plaintiff must allege sufficient jurisdictional facts in his or her complaint to establish a basis for Florida courts to exercise jurisdiction over a nonconsenting, nonresident defendant. ... A defendant challenging the jurisdiction of the court must then make a prima facie showing that the long-arm jurisdiction asserted is improper. Once the defendant makes the prima facie showing, the burden shifts to the plaintiff to prove the jurisdictional allegations asserted in the complaint.

Id. at 728 (citations omitted); see also, Compania Helvetica de Navegacion v. Zorilla, 479 So.2d 855 (Fla. 3d DCA 1985).

Plaintiff has not alleged sufficient facts in the Complaint to establish a basis for personal jurisdiction over Banco. In contrast, Banco has made a prima facie showing by virtue of the Affidavit that long-arm jurisdiction is improper. Thus, the burden of proving jurisdiction is on the Plaintiff, but the Plaintiff offered no evidence to rebut Banco's Affidavit. Accordingly, dismissal of the Complaint is proper.

It is undisputed that the only contact which Banco has with the State of Florida is the maintenance of correspondent bank accounts. The maintenance of correspondent bank accounts alone is not sufficient for the court to acquire personal jurisdiction over Banco. Under the Uniform Commercial Code, Banco could not

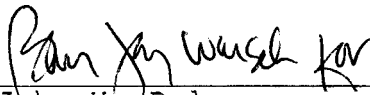
have breached a contract in Florida. The mere failure to pay money in Florida, standing alone, is insufficient to establish minimum contracts. Therefore, §48.193(1), Fla.Stat. (1987), does not confer long-arm jurisdiction. Accordingly, the trial court erred in denying Defendant's Motion to Dismiss, and the Complaint should have been dismissed with prejudice.


CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Decision of the Third District should be reversed, and this case remanded to the trial court with directions to dismiss the Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Petitioner's Brief on the Merits was mailed this 4th day of May, 1990 to Richard M. Goldstein, Esq., Goldstein & Tanen, P.A., One Biscayne Tower, Suite 3250, Two South Biscayne Boulevard, Miami, Florida, 33131.

